**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION**

ELLEN JOHNSTON PLAINTIFF

V. CAUSE NO. 2:07cv42 WAP, EMB

ONE AMERICA PRODUCTIONS, INC., TWENTIETH CENTURY-FOX FILM CORPORATION AND JOHN DOES 1 AND 2 DEFENDANTS

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO ALTER OR AMEND THE DISTRICT COURT'S ORDER DATED AUGUST 22, 2007 OR, IN THE ALTERNATIVE, TO CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C § 1292(b) AND ENTRY OF STAY

COMES NOW, Plaintiff, Ellen Johnston, by and through counsel, W.O. Luckett, Jr. of Luckett Tyner Law Firm, P.A., and files and serves her response to Defendants' Motion to Alter or Amend the District Court's Order Dated August 22, 2007 or, in the Alternative, to Certify the Order for Interlocutory Appeal under 28 U.S.C. §1292(b) and Entry of Stay as follows:

The aggrieved Defendants have moved the Court to alter or amend the Court's Order and/or in the alternative to certify the order for interlocutory appeal. The Court should not grant either of these alternative requests. Plaintiff's claim for punitive damages was based on an allegation that Defendants "gross negligence constituted willful, wanton, and reckless disregard for Ms. Johnston's right to privacy, for its own monetary profit" as worded this allegation may not have been as artfully pled as Plaintiff would now like, but nevertheless, she has asserted a claim under federal court "notice pleadings" for punitive damages because of either the gross negligence and/or willful, wanton and reckless disregard conduct of Defendants. The Court noted that she made

Dockets.Justia.com

such a claim in its Order. Simply because there was no briefing on this issue does not preclude the Court from judicially noting the content of Plaintiff's claim. Rather than having pled gross negligence, perhaps the Plaintiff should have more artfully pled only the willful, wanton and reckless disregard for Ms. Johnston's right to privacy. This is tantamount to pleading an intentional tort on behalf of the Defendants for their egregious conduct. The Court has established procedures at the appropriate time during the time to gauge and assess whether or not the Plaintiff has proven enough facts to allow the jury to consider an award of punitive damages. Given that the Court typically bifurcates the compensatory phase of the trial from the punitive, the Defendants should not feel aggrieved by the Court's ruling. Defendants' motion on this issue is more slight of hand and a play on words than a substantive attack on the Court's Order.

As to the other attacks on the Order, there is no need to either alter or amend the Order or to certify the order for interlocutory appeal given that Mississippi courts have recognized the § 625 E, restatement (2d) of torts as constituting a cause of action.

Legally, there is a fundamental difference in claims for false light invasion of privacy and claims for defamation. In claims for defamation the focus is on the false and defamatory nature of the publication. That is, the law requires prove of a false and defamatory statement of and concerning the plaintiff in a claim for defamation. In a claim for false light invasion of privacy, however, a claim is recognized where the underlying publication is true and factual, but the manner of its publication casts the plaintiff in a false light that is susceptible of jury determination as being highly offensive to one in the position of the plaintiff. See, Section 625E, Restatement (Second) of Torts:

> "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the published matter and the false light in which the other would be placed."

Cited in *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So.2d 77, 79 (Miss. 1986); see also, *Cook v. Mardi Gras-Casino Corp.*, 697 So.2d 378 (Miss. 1997).

The Defendants make the argument, repeatedly, that the Plaintiff, in essence, consented to her portrayal because she knew she was being filmed and voluntarily participated in the event. In making this argument, the Defendants must concede what the Plaintiff argues: that reasonable persons viewing the film in question could reasonably conclude that the Plaintiff was either a willing participant in a parody of her religious beliefs or voluntarily consented to the depiction in question, making her a willing participant to such a parody after the fact.. This is the false light in which the Plaintiff was placed. The viewers of the film are *not* aware that the Plaintiff's consent was never obtained; they are *not* aware that she was gulled into participating based on misrepresentations made to her by Cohen and the film crew; rather, a reasonable person viewing the movie could reasonably conclude that the Plaintiff was a willing participant (either before or after the fact) to a parody of a Pentecostal camp meeting.

Contrary to the Defendants' contentions, the Court has not departed from established principles of law in determining that at claim for false light invasion of privacy has been stated. The Court, in denying the Defendants' Motion to Dismiss stated that:

> [I]t is beyond mere speculation that there are jury questions of (1) whether the Pentecostal scene portraying the plaintiff waiving her arms in religious praise in response to Borat's apparent conversion would be highly objectionable to a reasonable person in the plaintiff's position, *See* Illustration 9 to comment *c*, *supra*, such that a person in the plaintiff's position would believe others would believe she willingly participated in a mocking of her religion; and (2) whether "the defendant [knew] that the plaintiff, as a reasonable [person], would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity,"

Court's Opinion at page10 .

In short, the Court has made clear that the question of fact to be determined by a jury is whether a reasonable person in the plaintiff's position (objective standard) would find the depiction of her to "cast her in a false light" (i.e., have given her consent to a mocking portrayal of her religion); and whether such an objectively reasonable person would find that false light portrayal to be "highly offensive". In determining that the Complaint articulates a claim from which a reasonable and objective finder of fact to make the requisite determination, the Court was compelled as a matter of law to deny the Motion to Dismiss. *Strickler v. NBC*, 167 F.Supp. 68 (S.D.Cal.1958); *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979); *Dempsey v. National Enquirer, Inc.*, 687 F.Supp. 692 (D. Me. 1988); and *Williams v American Broadcasting Company*, 96 F.R.D. 658, 669 (W.D. Ark. 1983).

The Court was also correct in finding that the Plaintiff has stated a claim for misappropriation. Here again, the Defendants attempt to have it both ways. They claim that their speech in this instance is not "commercial", and essentially ask the court to buy the same story used to dupe the Plaintiff: that the work in question is a documentary or, at worst, a somewhat fictionalized version of . . . Here the Defendants' argument must break down. Is this a fictionalized account of the life of Borat? No such person exists.

Is it a fictionalized version of the Plaintiff's life? No reasonable person could conclude that it was so. No, the work in question is purely commercial. It is *Candid Camera* without the consent forms. The Plaintiff is cast in a false light in order to market the product. Unlike the case of the plaintiff in *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994), the Plaintiff in this case is not a public figure, the events complained of are not based on facts in the public domain, the product is not a docu-drama (fictionalized or otherwise) of which the Plaintiff is the subject, and the use of the Plaintiff's likeness (obtained through false representations) is not subject to the "fair use" doctrine.

The value inherent in the Plaintiff's likeness is that she is not an actor hired to portray a participant in a Pentecostal camp meeting: she is the genuine article – made to appear as someone who has participated in the Borat "schtick". Because the Plaintiff's consent is tainted by the misrepresentations and falsehoods used to obtain her participation, the Defendants' Motion was properly denied by the Court.

WHEREFORE, PREMISES CONSIDERED, the Defendants' Motion to Alter or Amend the District Court's Order Dated August 22, 2007 or, in the Alternative, to Certify the Order for Interlocutory Appeal under 28 U.S.C. §1292(b) and Entry of Stay should be denied.

THIS the 18th day of September, 2007

Respectfully Submitted,
ELLEN JOHNSTON

/s/ William O. Luckett, Jr.
W.O. LUCKETT, (MSB# 1487)

LUCKETT TYNER LAW FIRM, P.A.
143 YAZOO AVENUE
POST OFFICE DRAWER 1000
CLARKSDALE, MISSISSIPPI 38614
(662)624-2591
(662)627-5403

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2007 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following person: **John Henegan**.

/s/ William O. Luckett, Jr.
W.O. LUCKETT, JR.